IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 189 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

MAHENDRABHAI KARSANBHAI RATHOD

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Revision Application No. 189 of 1999

HL PATEL ADVOCATES for Petitioner No. 1

Mr B D Desai, APP for Respondent No. 1

UNSERVED-EXPIRED (R) for Respondent No. 2

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 04/02/2002

ORAL JUDGEMENT

The petitioner above named, has preferred this criminal revision application under section 397 read with

section 401 of the Criminal Procedure Code, 1973 (for short, 'the Code'). The petitioner was prosecuted before the learned Metropolitan Magistrate, Court no.12, Ahmedabad in Criminal Case No.649/90 filed by way of a private complaint by respondent no.2 herein, who is no more. It is reported that respondent no.2 has passed away. The said respondent had filed the aforesaid criminal case against the present petitioner for offence punishable under section 497 of IPC.

2. The case of the second respondent (now deceased) original complainant in the aforesaid criminal case was that the deceased Chandulal Shitalbhai had contracted marriage with one Shakuntala on 28.4.1980 and since then they were staying as husband and wife in the house of Chandulal. However, Shakuntala did not like Chandulal and she developed relations with the petitioner who used to visit her house at Ahmedabad even in absence of Chandulal since Chandulal was serving as a Driver in S.T. Corporation and hence, was often required to go out. Chandulal came to know about the relationship and on an inquiry on 25.8.1990, he could find out photographs of the petitioner and Shakuntala. Some letters were also seen. Then on 26.8.1990, Chandulal went out, as usual, to attend to his duty but soon returned at about 10 a.m. and found from a window of his house that the petitioner and Shakuntala were together in the room in a compromising position. Some other witnesses also saw this incident. Chandulal filed private complaint against the petitioner. The complaint was registered and the present petitioner appeared before the said court which, after completing the trial, convicted the petitioner for the said offence and sentenced him to suffer R.I. for three years. The petitioner was directed to pay fine of Rs.5,000/- for the said offence and in default of payment of fine, he was directed to suffer further R.I. for 9 months by order dated 15.4.1998. The petitioner felt aggrieved by the said judgment and conviction order of the learned Magistrate and, therefore, he preferred Criminal Appeal No.60/98. The learned Addl.Sessions Judge, Court No.23 disposed of the said criminal appeal by judgment and order dated 15.3.1999. There the learned Addl.Sessions Judge partly allowed the said appeal. He confirmed the conviction of the petitioner for the said offence. However, the sentence of three years was reduced to two years keeping in tact the order of payment of fine and the sentence in default of payment of fine. Feeling aggrieved by the said judgment and order of the learned Addl.City Sessions Judge, the petitioner has preferred this revision application before this court. It has been mainly contended in this revision application

that the two courts below have not properly appreciated the fact that this was a fit case for extending probation under the Probation of Offenders Act, 1958. That even looking to the age of the petitioner it was obligatory on the part of the two courts below to extend the said benefit. Even otherwise, the orders are erroneous and illegal and it deserve to be quashed and set aside. The petitioner has therefore, prayed for setting aside those conviction and sentence orders, in the alternative, a prayer has been made to extend benefit of probation under the Probation of Offenders Act, 1958.

3. On receipt of the said revision application, rule was issued and Mr B D Desai, learned APP appears for the State of Gujarat. However, the second respondent being the original complaint in the aforesaid criminal case has passed away and there is no dispute about the same.

4. During the course of arguments, learned Advocate for the petitioner has submitted a School Leaving Certificate in respect of the petitioner obtained from New Sarvodaya High School at Ahmedabad issued on 23.7.1992 by the Principal of the said school. It shows that the date of birth of the present petitioner is 23.5.1970. The offence in question is said to have been committed by the petitioner on 25.8.1990. Therefore, the petitioner had completed 20 years but had not completed 21 years on the date on which the offence was committed. The provision made in section 6 of the Probation of Offenders Act, 1958 (for short, 'the Act') says that when any person under the age of 21 years is found guilty of having committed an offence punishable with imprisonment but not with imprisonment for life, the court by which the person is found guilty shall not sentence him to imprisonment unless it is satisfied that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it would not be desirable to deal with him under section 3 or section 4, and if the court passes any sentence of imprisonment on the offender, it shall record its reasons for doing so.

5. It appears from the record that there was no specific plea raised by the present petitioner before the two courts below that the petitioner was below the age of 21 years at the time of commission of the offence and, therefore, the above provision 6 of the said Act would be attracted. Therefore, the said provision has not been considered by the two courts below. So far as this court is concerned, the petitioner has specifically placed on record that documentary evidence to show that the

petitioner was below 21 years at the time when the offence was committed. The learned APP was at liberty to verify the position and on verification he says that the contents of the said certificate are true. The petitioner was really below 21 years when the offence was said to have been committed. It is, therefore, clear that the petitioner was below 21 years when the offence was committed by him and, therefore, as a matter of rule, he was entitled to be released on probation under the said Act. When the court finds that there is some exceptional case which would prevent the petitioner from getting such benefits, then naturally such benefits cannot be granted to the petitioner. But in the present case, no such antecedents have been brought on record in respect of the petitioner.

6. At the same time, the original complainant being the second respondent in this revision application has passed away. The incident took place in 1990 and, therefore, more than 11 years have gone. The petitioner went through the proceedings of the two courts below and his revision application in this court is also pending since more than two years. In that view of the matter, it cannot be said that there is some ground which would disentitle the present petitioner from getting the benefit of probation. It is well settled that if a person is convicted for offence punishable with imprisonment but not imprisonment for life would be entitled to be released on probation under the provisions of that Act and if he is found to be below 21 years at the time of commission of offence, Section 6 itself is clear in this respect.

7. In above view of the matter, I am of the view that this is not a case wherein the present petitioner is not entitled to the said benefit. Therefore, it would be in the fitness of things to enlarge the petitioner on probation of good conduct in accordance with the provisions made in section 4(1) of the said Act.

8. As said above, learned Advocate for the petitioner does not press this application on merit and has simply requested the Court to consider desirability of extending the benefit under the said Act. Above statement was made under express instructions from the petitioner. Learned APP also states that the petitioner is found to be below 21 years at the time of commission of offence and, therefore, when there is nothing against the petitioner, it would not be wrong if the said benefit is extended to the petitioner.

9. For the foregoing reasons, I am of the view that this is a fit case for extending the said benefit and therefore, the present prevision application is partly allowed. The judgment and conviction order recorded against the petitioner are hereby confirmed. However, instead of immediately sentencing the petitioner to imprisonment as aforesaid, it is directed that the petitioner shall be released on his entering into a bond of Rs.5000/- with one surety of the like amount to appear and receive the sentence as and when called upon during a period of three years from the date of execution of the bond and submission of surety and in the meantime, the petitioner shall keep peace and be of good behaviour under section 4(1) of the Probation of Offenders Act, 1958. In the interest of the offender as well as of the public, it is directed that the petitioner shall remain under supervision of the Probation Officer, Ahmedabad City for the above period and the concerned Probation Officer shall periodically visit the petitioner to ascertain his conduct for the aforesaid period. The said officer shall periodically submit his report and remark to the said Court. The petitioner shall cooperate with the said Officer for discharge of his duties. Rule is made absolute to that extent.

Copy of this order shall be sent to the Probation Officer, Ahmedabad City for due compliance of this order.

4.2.2002 [D P Buch, J.
msp